In the Punjab and Haryana High Court at Chandigarh.

Date of Decision: 17.09.2007.

Surjeet @ Surjit Singh Kataria and others .... Petitioners.

Versus

Raj Hans and others .... Respondents.

CORAM

HON'BLE MR. JUSTICE PERMOD KOHLI

Present: For the petitioners:

Mr.V.K. Jain,Senior Advocate, with
Mr.Pritam Saini,Advocate.

For the respondents:

Mr. C.B. Goel, Advocate.

PERMOD KOHLI, J.

This is defendant's revision petition against the order dated 11.11.2004 passed by the learned Additional District Judge, Gurgaon, in Civil Misc. Appeal, against the order dated 26.2.2004 passed by the learned Civil Judge (Junior Division), Gurgaon. Vide the impugned order, the learned Lower Appellate Court has directed to maintain status-quo with regard to the construction over the land in question till the final decision of

the suit. This order has been passed after setting aside the order dated 26.2.2004 passed by the learned Civil Judge (Junior division), Gurgaon, whereby the application for ad interim injunction was dismissed by the learned trial Court.

The respondents filed a suit for partition with consequential relief of permanent injunction claiming the suit land to be joint between the parties, who are co-sharers. Along with the suit, an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure also also came to be filed seeking restraint order against the defendants from raising any construction over the vacant part of the property.

It is admitted case of the parties that Baljit Singh, Ajit Singh and Surjit Singh are the real brothers, who are sons of Budh Ram, who was the original owner of the land in question. The parties are in possession of separate parts of the suit land. It has been claimed in the suit that the parties are co-sharers in the joint possession of the land total measuring 3 Bighas, 4 Biswas and 4 Biswansis. It was further alleged that the defendants want to diminish the value of the suit land by changing its nature by raising construction and in the event, they succeeded in doing so, the plaintiffs will suffer irreparable loss, which cannot be compensated in terms of money.

Defendant Nos.1 and 2 are the legal representatives of Ajit Singh son of Budh Ram, whereas the plaintiffs are the legal representatives of Baljit Singh son of Budh Ram. Defendant No.3 Surjit Singh is the third

son of Budh Ram and brother of late Baljit Singh, Ajit Singh, whereas defendant Nos.4 and 5 are the sons of Surjit Singh. Defendant Nos.3 to 5 claimed that they are in exclusive possession of the portion of the land where they intend to raise construction. It has been further pleaded that Baljit Singh and Ajit Singh sold most of their shares in the suit land to various persons and those purchasers have already constructed shops and houses on the same. It has also been pleaded that even Smt.Sheela widow of Ajit Singh has constructed shops in the land of her share. According to defendant Nos.3 to 5, the land belonging to the share of defendant No.3 is lying vacant and they intend to raise construction over their share as the property stands partitioned since the life time of Budh Ram. The defendants have also placed on record a site plan showing separate portions in possession of defendant No.3, his two brothers, Ajit Singh and Baljit Singh and also the construction raised by the various vendees, who purchased the property from Baljit Singh and Ajit Singh.

On the basis of the pleadings of the parties and the material placed on record, the learned trial Court dismissed the application for ad interim injunction, while passing the order dated 26.2.2004. The learned trial Court also relied upon various sale deeds executed by Baljit Singh and Ajit Singh in favour of third parties admitting therein that the plots sold have fallen to their shares in family partition. The learned trial Court also noticed that the site plan produced by defendant No.3 showing separate possession of the respective parties and also the construction raised by the various vendees over the plots purchased by them from Baljit Singh and Ajit

Singh, has not been disputed.

Aggrieved of the order dated 26.2.2004, the plaintiffs filed a Civil Misc. Appeal in the Court of learned Additional District Judge, Gurgaon, who vide the impugned order dated 11.11.2004 set aside the order of the learned trial Court, whereby ad interim injunction was refused, and directed the parties to maintain status-quo over the land till the final disposal of the suit.

The learned Lower Appellate Court has stated that whether or not the suit land has been partitioned, is a contentious issue and can be decided appropriately only after affording due opportunity to the parties to lead their respective evidence and accordingly, it observed that it will be just and equitable if the subject matter is maintained in status-quo.

I have heard the learned counsel for the parties and gone through the record of the case very carefully.

The learned trial Court by its detailed and well reasoned order declined the relief of ad interim injunction. It was persuaded by two factors i.e. (i) that Baljit Singh and Ajit Singh, both during their life time sold the part of the suit land to various persons by different sale deeds claiming themselves to be exclusive owners in possession on the basis of the family partition. (ii) that they have also raised construction in part of the property in their possession. Sale deeds dated 25.08.1989, Annexure P-4, dated

04.09.1989 Annexure P-5, dated 14.05.1993 Annexure P-6, dated 15.04.1994 Annexure P-7, dated 25.08.1989 Annexure P-8, dated 06.10.1989 Annexure P-9 and dated 06.10.1989 Annexure P-10, have been executed jointly by Baljit Singh and Ajit Singh as also individually by Baljit Singh claiming to be the owners in possession by mutual partition. Copies of these sale deeds have also been filed along with this revision petition. The learned trial Court heavily relied upon these sale deeds, the existence and validity whereof was never disputed by the plaintiffs in the suit. Even the site plan Annexure P-3 produced by defendant No.3 showing the construction raised by various persons including plaintiffs, is also not disputed. The learned Lower Appellate Court did notice these sale deeds and the site plan, but without making any comment, directed maintenance of status-quo only on the ground that whether there is partition or not between the parties, is a contentious issue. Defendant No.3 has categorically stated that neither he has sold any part of the property of his share, nor raised any construction over the same so far. In these circumstances, the question arises whether he should be prevented from raising any construction.

Mr. CB. Goel, learned counsel appearing for the respondents has relied upon the judgments of this Court in the case of Suba Singh Vs. Mohinder Singh and others, 1983 P.L.J., 429 and Arjan Singh and others Vs. Hem Raj and others, 1983 P.L.J., 56, to argue that the partition of agricultural land without corresponding entries in the revenue record cannot be recognised. He has also referred to the judgment of the Hon'ble Supreme Court in the case of Maharwal Khewaji Trust (Regd.), Faridkot

Vs. Baldev Dass, AIR, 2005, 104, wherein the Apex Court observed that the Appellate Court should not allow to change the status of the property during the pendency of the litigation, except in exceptional circumstances.

On the other hand, learned Senior Counsel Mr. V.K. Jain, appearing for the petitioners has relied upon Guru Nanak Education Trust (Regd.) and others Vs. Sh. Balbir Singh and others, 1995 P.L.J., 207, wherein the learned Single Judge of this Court laid down the principles for interference in the judicial discretion exercised by the trial Court. The relevant observations in paragraph 19, are as under:-

> "A reading of the order passed by the appellate Court shows that the said Court has no where recorded a finding that the trial Court has recorded a finding of prima facie case, balance of convenience and irreparable loss without applying the settled principles of law or that it has ignored any material fact while recording a finding in favour of the plaintiff-petitioners. The lower appellate Court has also not held that the conclusions recorded by the trial Court are perverse or are against the settled principles of law. Without recording any such finding the appellate Court has proceeded to contradict

> the conclusion recorded by the trial Court as if the lower appellate Court was itself exercising the jurisdiction of the trial Court and in my opinion this course adopted by the appellate Court has the effect of rendering its order as patently illegal and the one which has occasioned failure of justice."

In arriving above conclusion, the learned Single Judge relied upon Smt. Vimla Devi Vs. Jang Bahadur, AIR 1977, Rajasthan, 196, wherein the following observations have been made:-

> "The order refusing temporary injunction is of a discretionary character. Ordinarily Court of appeal will not interfere with the exercise of discretion by the trial Court and substitute for it its own discretion. The interference with the discretionary order, however, may be justified if the lower Court acts arbitrarily or perversely, capriciously or in disregard of sound legal principles or without considering all the relevant records.
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> The mere possibility of the appellate Court coming to a different conclusion on the

same facts and evidence will also not justify interference."

In the present case, though defendant Nos.3 to 5 have claimed that the property stands partitioned, but assuming that the property is still joint, co-sharers, who are in exclusive possession, cannot be prevented from raising any construction over the same by issuing injunction. If the property stands partitioned as claimed by defendant Nos.3 to 5, who are in possession of their separate shares, they are entitled to raise constructions. Thus, under both the situations, defendant Nos. 3 to 5 cannot be prevented from raising construction. There is enough material on record in the form of registered sale deeds executed by Baljit Singh and Ajit Singh i.e. two brothers of defendant No.3 to indicate that they have sold part of their share as owner in possession to various vendees, who are also put in possession and they have also constructed various shops and houses thereon. Defendant No.3 is the only co-sharer who has neither sold any portion of his share in the property nor raised any construction thereon and the land in his possession claimed to be of his share is lying vacant. The site plan Annexure P-3 is an indicator of separate portions. The site plan also reflects constructions made by various vendees, who are not co-sharers but have purchased plot from Baljit Singh and Ajit Singh. Neither this site plan is disputed nor the sale deeds executed by Ajit Singh and Baljit Singh are denied. Therefore, whatever may be the situation, defendant No.3 cannot be prevented from raising any construction over his share of the land or any vacant piece of land in his exclusive possession even if the property is stated to be joint.

The contention of the plaintiffs is otherwise dishonest. Admittedly, they have sold the land of their shares to various persons claiming to be owners in possession on the basis of the mutual partition. When it comes to the claim and right of defendant No.3, they have set up the plea of jointness of the property and are claiming partition. In the event they succeed in their suit, the entire property is required to be adjusted in partition including the portion sold by them. Therefore, they cannot raise a plea of irreparable loss to them or the change in the nature of the property.

The ratio of judgment in Smt.Vimla Devi Vs. Jang Bahadur (supra) is fully applicable to the facts of the present case. The learned trial Court's order is based upon material on record, whereas the order of the learned Lower Appellate Court has been passed without arriving at any conclusion that the judicial discretion exercised by the learned trial Court suffers from arbitrariness or is contrary to the facts on record or is perverse or in disregard of sound legal principles. In any case, raising of construction by a co-sharer is always subject to partition. Even if the plaintiffs succeed ultimately, the constructions raised by the defendants over a part of the property in their exclusive possession, will be subject to partition. A Division Bench of this Court has further laid down the following principles for grant or refusal of injunction where the property is jointly owned by the parties. The principles enunciated in Bachan Singh Vs. Swaran Singh, (2000-3) P.L.R., 416, are as under:-

(i) A co-owner who is not in possession of any part of the property is not entitled to

seek an injunction against another co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession.

(ii) Mere making of construction or improvement of, in the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest."

Applying the above principles also, I find that the order of the learned Lower Appellate Court is not sustainable in law and is required to be set aside. This revision petition is, accordingly, allowed. The impugned order dated 11.11.2004 passed the learned Lower Appellate Court, Gurgaon, is hereby set aside and that of the learned trial Court restored. Resultantly, the status-quo order passed by the learned Lower Appellate Court, Gurgaon, stands vacated. No costs.

September 17, 2007. (PERMOD KOHLI)
BLS JUDGE

Note: Whether to be referred to the Reporter: YES